

UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA

HAROLD PERKINS, III,	)	Case No. SA CV 08-993 PJW
	)	
Plaintiff,	)	
	)	MEMORANDUM OPINION AND ORDER
v.	)	
	)	
MICHAEL J. ASTRUE,	)	
Commissioner of the	)	
Social Security Administration,	)	
	)	
Defendant.	)	

---

Before the Court is Plaintiff's appeal of a decision by Defendant Social Security Administration ("the Agency"), denying his applications for Supplemental Security Income ("SSI") and Disability Insurance Benefits ("DIB"). Because the Agency's decision is not supported by substantial evidence, it is reversed and the case is remanded.

On June 24, 2005, Plaintiff applied for SSI and DIB. (Administrative Record ("AR") 74.) The Agency denied the applications initially and on reconsideration. (AR 56-60, 62-66.) Plaintiff then requested and was granted a hearing before an Administrative Law Judge ("ALJ"). On September 27, 2007, Plaintiff appeared with counsel at the administrative hearing and testified. (AR 225-39.) On January

1 16, 2008, the ALJ issued a decision denying benefits. (AR 17-27.)  
2 Plaintiff appealed the ALJ's decision to the Appeals Council, which  
3 granted his request for review. (AR 10-15.) On July 23, 2008, the  
4 Appeals Council issued its decision, denying Plaintiff's claims. (AR  
5 3-9.) He then commenced this action.

6 Plaintiff claims that the ALJ erred by: 1) failing to develop the  
7 record regarding Plaintiff's mental impairment; 2) misrepresenting the  
8 medical record; 3) failing to consider the severity of Plaintiff's  
9 mental impairment; 4) failing to obtain vocational expert testimony on  
10 the effect of Plaintiff's non-exertional limitations; and 5) improp-  
11 erly rejecting Plaintiff's testimony.<sup>1</sup> (Joint Stip. at 3.) For the  
12 following reasons, the Court concludes that the ALJ erred in failing  
13 to develop the record and that the matter must be remanded for that  
14 purpose.<sup>2</sup>

15 In his first claim of error, Plaintiff contends that the ALJ  
16 failed to properly develop the record by obtaining a consultative  
17 psychiatric examination. (Joint Stip. at 3-4.) As explained below,  
18 though the Court finds this to be a very close call, and lays the  
19 blame for the deficient record primarily at the feet of Plaintiff's  
20 counsel, the Court agrees that remand for further proceedings is  
21 warranted.

22 Plaintiff did not allege that he suffered from a mental  
23 impairment in July 2008, when he filled out and submitted a disability  
24

---

25 <sup>1</sup> The Court has separated Plaintiff's first issue into two.

26 <sup>2</sup> Although the Appeals Council's decision is the "final  
27 decision" of the Agency, it adopted the ALJ's findings with respect to  
28 the issues raised in this court. Thus, the Court will focus on the  
ALJ's decision.

1 report and a daily activities questionnaire in support of his  
2 applications. (AR 83, 112-14.) In an undated disability report he  
3 submitted subsequently, however, Plaintiff stated that "[m]y illness  
4 won't allow me to work because [of] the voices in my head and it's  
5 hard for me to sleep. I don't get proper rest and my body is  
6 drained." (AR 119.) In another disability report, dated March 30,  
7 2006, Plaintiff stated that he had been hearing voices "on and off"  
8 since February 22, 2002, and that these voices prevented him from  
9 sleeping or resting. (AR 140, 142, 149, 151.)

10 On December 13, 2006, while incarcerated, Plaintiff complained of  
11 auditory hallucinations and was examined by someone from the Orange  
12 County Health Care Agency Correctional Mental Health Services. (AR  
13 193.) This person, whose name is illegible on the chart note,  
14 reported that Plaintiff's speech was clear and his thought content was  
15 "organized," but that he was a poor historian and that his judgment  
16 and insight were poor. (AR 193.) Plaintiff claimed that a voice told  
17 him "not go to probation." (AR 193.) He also claimed that he had  
18 received psychiatric treatment in the past, but was unable to provide  
19 any details about the treatment. (AR 193.) The record contains no  
20 other evidence of mental health treatment.

21 At the administrative hearing on September 27, 2007, Plaintiff  
22 testified that he was depressed "a lot" and that his depression was  
23 "severe." (AR 232.) He also testified that he sometimes had memory  
24 problems, had difficulty concentrating, had nightmares, and sometimes  
25 saw and heard things that were not there. (AR 232-33.) Plaintiff  
26 testified that he had gone to a psychiatrist or psychologist for a  
27 year in 2006. (AR 237-38.) He conceded, however, that he did not  
28 take prescription medication, had not been hospitalized overnight

1 since 1998, and was not seeing a doctor at the time of the admini-  
2 strative hearing. (AR 234, 235.)

3 In his decision, the ALJ noted that "the record contains no  
4 evidence of treatment for any mental impairment. Apart from the one  
5 time when [Plaintiff] alleged mental problems while he was in jail,  
6 there is no evidence that [Plaintiff] ever sought treatment for, or  
7 mentioned having problems with, any mental impairment." (AR 27.)

8 With respect to the examination while Plaintiff was in jail, the ALJ  
9 noted that the examination "revealed organized thought processes and  
10 orientation in three spheres. [Plaintiff] indicated that he had been  
11 treated with psychotropic medication in the past, but he was unable to  
12 name the medication or the name of the clinic or treating physician."  
13 (AR 25-26.) After finding that Plaintiff's statements regarding his  
14 symptoms were not credible, the ALJ concluded that Plaintiff's  
15 impairments were not severe and, therefore, he was not disabled. (AR  
16 27.)

17 Plaintiff contends that the ALJ had a duty to develop the record  
18 by ordering a psychiatric examination to determine the severity of his  
19 mental impairment. (Joint Stip. at 4.) The Agency counters that  
20 Plaintiff had the burden of producing medical evidence to establish  
21 that he had a mental impairment and he failed to do so. The Court  
22 finds that both are right. Plaintiff had a duty to develop the record  
23 and he failed. See 20 C.F.R. §§ 404.1512(c), 416.912(c). And the ALJ  
24 had a corresponding duty to develop the record and he failed, too.  
25 See *Tonapetyan v. Halter*, 242 F.3d 1144, 1150 (9th Cir. 2001) (quoting  
26 *Smolen v. Chater*, 80 F.3d 1273, 1288 (9th Cir. 1996)) (noting ALJ has  
27 an "independent duty to fully and fairly develop the record and to  
28 assure that the claimant's interests are considered," even when the

1 claimant is represented by counsel). Thus, the Court is left to  
2 resolve this case based on an inadequate record for which both parties  
3 are partly responsible. Though the Court concedes that this is a very  
4 close case because of the almost total lack of evidence supporting  
5 Plaintiff's claimed psychiatric impairment, for the reasons explained  
6 in detail below, it sides with Plaintiff and orders that the case be  
7 remanded so both Plaintiff and the ALJ can further develop the record.

8 "Ambiguous evidence, or the ALJ's own finding that the record is  
9 inadequate to allow for proper evaluation of the evidence, triggers  
10 the ALJ's duty to 'conduct an appropriate inquiry.'" *Id.* Where the  
11 claimant may be mentally ill, the ALJ's duty to develop the record is  
12 "heightened." *Id.* (citing *Higbee v. Sullivan*, 975 F.2d 558, 562 (9th  
13 Cir. 1992)); see also 20 C.F.R. §§ 404.1512(e) and 416.912(e).<sup>3</sup>  
14 Indeed, the governing statute provides that, "in any case where there  
15 is evidence which indicates the existence of a mental impairment, [a  
16 determination that the claimant is not disabled] shall be made only if  
17 [the ALJ] has made every reasonable effort to ensure that a qualified

---

18  
19  
20 <sup>3</sup> The regulations provide:

21 When the evidence we receive from your treating  
22 physician or psychologist or other medical source  
23 is inadequate for us to determine whether you are  
24 disabled, we will need additional information to  
25 reach a determination of a decision ... (1) ...  
26 We will seek additional evidence or clarification  
27 from your medical source when the report from your  
28 medical source contains a conflict or ambiguity  
that must be resolved, the report does not contain  
all the necessary information, or does not appear  
to be based on medically acceptable clinical and  
laboratory diagnostic techniques.

20 C.F.R. §§ 404.1512(e), 416.912(e).

1 psychiatrist or psychologist has completed the medical portion of the  
2 case review and any applicable residual functional capacity assess-  
3 ment." 42 U.S.C. § 421(h).

4 Here, Plaintiff had alleged on several occasions, including while  
5 in jail, that he heard voices, which stopped him from sleeping and  
6 getting rest, that he had difficulty concentrating, and that he was  
7 depressed. The ALJ rejected Plaintiff's allegations essentially  
8 because the record contained no evidence of mental health treatment.  
9 (AR 27.) That was not a proper basis for dismissing this claim. The  
10 Ninth Circuit has "particularly criticized the use of a lack of  
11 treatment to reject mental complaints both because mental illness is  
12 notoriously underreported and because 'it is a questionable practice  
13 to chastise one with a mental impairment for the exercise of poor  
14 judgment in seeking rehabilitation.'" *Regenitter v. Comm'r, Soc. Sec.*  
15 *Admin.*, 166 F.3d 1294, 1299-1300 (9th Cir. 1999); see also *Hilliard v.*  
16 *Barnhart*, 442 F. Supp. 2d 813, 817 (N.D. Cal. 2006) (remanding for  
17 further development of record even though claimant failed to provide  
18 objective medical evidence of his psychological impairment because he  
19 had "raised a suspicion concerning his alleged cognitive impairment,"  
20 and the record evidence was inadequate). In this situation, the Court  
21 concludes that the ALJ should have ordered a consultative psychiatric  
22 exam to resolve the uncertainty in this case. See 20 C.F.R.  
23 § 404.1519a(b). On remand, the ALJ should do so.

24 Having second-guessed the ALJ's efforts in this case, the Court  
25 turns now to the real reason why this case was not properly resolved  
26 before the Agency: Plaintiff's counsel did a poor job. Counsel knew  
27 before the hearing that Plaintiff claimed that he had been placed  
28 under psychiatric counseling by a court in Orange County. (AR 153.)

1 Yet, none of these records was produced. Counsel knew, or should have  
2 known, that Plaintiff claimed that he had undergone psychiatric  
3 treatment for a year in 2006, the year preceding the administrative  
4 hearing (AR 237-38), yet counsel did not produce any records regarding  
5 that treatment. This, despite the Agency's repeated reminders that  
6 counsel could submit more records. (AR 12, 228, 238.) Counsel knew  
7 that there was no opinion from a psychiatrist in the record regarding  
8 Plaintiff's psychiatric condition. Yet, counsel never requested that  
9 the ALJ order a consultative examination.

10 More troublesome, is counsel's failure to make any effort at the  
11 administrative hearing to champion Plaintiff's case. Counsel asked no  
12 questions during the hearing. He made his appearance at the outset  
13 and told the ALJ at the conclusion of the hearing that he had no  
14 questions. (AR 225-39.) There were many areas that could have and  
15 should have been developed. For instance, the record indicates that  
16 Plaintiff lost two of his children, his wife, and his mother. (AR  
17 80, 173, 229.) Counsel certainly should have developed the facts  
18 surrounding these losses in the administrative hearing, as even a lay  
19 person would suspect that losing this many people in one's immediate  
20 family could trigger depression or worse. The record also shows that  
21 Plaintiff continually mentioned that he could not afford medical care.  
22 (AR 152, 173.) In fact, he tried to explain this to the ALJ, but the  
23 ALJ cut him off. (AR 234.) This inability to pay for medical care  
24 might have provided a sufficient explanation for the obvious lack of  
25 medical records supporting Plaintiff's case. Yet, Plaintiff's counsel  
26 never questioned Plaintiff at the hearing to allow him to explain that  
27 he could not afford to pay for medical care.



1        There were many other areas counsel could have developed in an  
2 effort to further Plaintiff's cause. But counsel did nothing before,  
3 during, or after the hearing to bolster Plaintiff's case. There is  
4 absolutely no way that seasoned counsel could look at the record in  
5 this case and think that Plaintiff had carried his burden of  
6 establishing that he suffered from a psychiatric impairment. The  
7 Court finds this particularly troublesome for a lawyer from a firm  
8 that makes its living doing social security cases and routinely  
9 submits fee applications to this court for fees in excess of \$500 an  
10 hour, sometimes in excess of \$1,00 per hour, for his work.

11        On remand, Plaintiff's counsel is ordered to locate all  
12 outstanding records and submit them to the ALJ for his consideration,  
13 including any court orders placing Plaintiff in mental health  
14 counseling, psychiatric treatment records stemming from Plaintiff's  
15 2006 psychiatric treatment (or any other treatment), and any other  
16 records that exist that might support Plaintiff's claim that he  
17 suffers from a psychiatric impairment. Further, in any subsequent  
18 administrative hearing, counsel should insure that Plaintiff's story  
19 is told on the record so as to allow him at least a fighting chance of  
20 obtaining benefits.

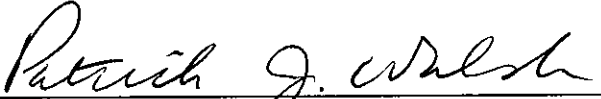
21        Plaintiff's remaining claims--that the ALJ misrepresented the  
22 record, failed to properly consider the extent of Plaintiff's mental  
23 impairment, failed to obtain vocational expert testimony, and  
24 improperly rejected Plaintiff's credibility--all hinge on development  
25 of the record on remand. After obtaining a consultative psychiatric  
26 evaluation and any new records, the ALJ should hold another  
27 administrative hearing and address these other claims as he sees fit.



1 For these reasons, the Agency's decision is reversed and the case  
2 is remanded for further proceedings consistent with this Memorandum  
3 Opinion and Order.

4 IT IS SO ORDERED.

5 DATED: December 22, 2009.

6  
7 

8 PATRICK J. WALSH  
9 UNITED STATES MAGISTRATE JUDGE  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

S:\PJW\Cases-Soc Sec\PERKINS, H 993\Memo\_Opinion.wpd